

DUPLICATE

Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY.....
In the Matter of the Application of)

GAF BROADCASTING COMPANY, INC.,)

For Renewal of License of Station)
WNCN (FM), New York, New York)
.....)File No.
BRH-910201WL

To: The Commission

REPLY TO OPPOSITION TO PETITION TO DENY

Undersigned Quill is the attorney and only attorney in the

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the Guild's *Petition to Deny*, "[t]he Guild has no economic or financial stake in any broadcast . . . applicant," including The Fidelio Group, Inc.³ Moreover, GAF Broadcasting's suggestions that the Guild was responsible for the filing of a competing application for WNCN's license in 1981 and that it thereafter participated in a settlement involving a cash payment by GAF are both false and misleading.

As GAF Broadcasting well knows, the Guild took positions before the Commission in the 1981 renewal proceeding that were in opposition to those advocated by Classical Radio, Inc. ("Classical"), the competing applicant. Specifically, the Guild then advocated the *renewal* of WNCN's license (subject to a requested condition that would not have benefited Classical) and *opposed* the settlement under which a payment (in which the Guild had no interest or share) was made to Classical. The founders of Classical who resigned from positions in the Guild in 1981 did not act in concert with the Guild then and have had no further association with the Guild in the ten years since.⁴

B. References to Pending Proceedings

The Guild's incorporation by reference of its prior pleadings and other filings before the Commission in the proceeding involving the Licensee's application for consent to transfer of control of WNCN is clearly appropriate. GAF is in error both in its assertion that the Guild is required to cite "new facts" in support of its *Petition to Deny*, and in its contention that the continuing pendency of the Guild's previously-asserted arguments before the Commission in the transfer proceeding would make their consideration

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Since, as GAF admits, the Mass Media Bureau's decision in the transfer proceeding remains subject to reconsideration, there has been no final resolution of the issues in that proceeding that would preclude the Guild from raising those issues herein. Moreover, since, as the Guild's *Petition to Deny* makes clear,⁶ those issues are directly relevant and material to the central question in *this* proceeding — whether renewal of WNCN's license is warranted — it is entirely appropriate that such issues be considered by the Commission in that context, and not merely in connection with the transfer of control of the Licensee.

The Commission need not engage in "duplicative" activities in order to resolve those issues for the purposes of both the transfer and renewal proceedings. What would be truly wasteful of resources would be the repetition at length of the Guild's prior pleadings and GAF's prior responses thereto.⁷

C. Allegations of Criminal Misconduct

The reversal of the convictions of GAF and Sherwin and the Government's decision not to retry them a fourth time⁸ by no means obviates the need for a hearing. That culmination of the criminal proceeding leaves unresolved the truth or falsity of the allegations of criminal misconduct against GAF and Sherwin. Since, under these circumstances, the Commission cannot defer to a nonexistent adjudication by another tribunal, it must itself conduct a hearing to determine the licensee's character and fitness.

The sworn testimony at the trials of GAF and Sherwin raise questions that

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fitness of Heyman himself to be a Commission licensee. Resolution of those questions in a Commission hearing is now the sole forum in which the Licensee's and Heyman's fitness can be determined.

It would be inappropriate for the Commission to disregard the charges merely because of their dismissal under highly unusual circumstances. The Second Circuit's reversal of the convictions does not represent a finding of the defendants' innocence, and, indeed, was not even based on a finding that the evidence on which the conviction rested lacked probative value. Moreover, it clearly rests strongly upon the principle that guilt in a criminal case must be proved beyond a reasonable doubt — a standard vastly more stringent than that which would apply in a Commission hearing, where an applicant must bear the ultimate burden of persuasion that it is of fit character.

It would do violence to the public interest standard if the Commission were to disregard these serious charges of misconduct without so much as a sworn denial from those accused, much less the full and candid disclosure and explanation that a licensee ought to provide to the Commission⁹. Moreover, the Commission certainly may take notice¹⁰ of the indictment and the ensuing record in the criminal proceeding in the course of its own hearing, so as to enable it to determine the basis of both the convictions and the reversals, and thereby to reach conclusions as to the proper effect thereof on the Licensee's trustworthiness and fitness to serve the public interest.

D. Licensee's Abuse of the Commission's Processes

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9. Whether or not designation of a hearing would fall within the literal provisions of the Commission's Character Policy is not controlling, as the Commission has ample power to interpret or even modify that Policy in an appropriate case. See *South Carolina Radio Fellowship*, FCC No. 81-255, at para. 6 n. 3 (released Aug. 13, 1991).
 10. GAF Broadcasting's attack on the sufficiency of the Guild's *Petition to Deny*, see *GAF Opposition* at 5-6, disregards the provision in 47 U.S.C. § 309(d)(1) that matters of which official notice may be taken need not be supported by affidavit, and in any event would raise literalism to an inappropriate level in disregard of that statute's purpose.

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Contrary to what GAF Broadcasting asserts, the Guild does not seek to bring a "private commercial dispute"¹¹ before the Commission. Rather, the essence of the Guild's allegations¹² is that GAF's dealings with the Guild in connection with the name of the "WNCN Listeners' Club" (as well as in connection with a confidentiality agreement) have abused the processes of the Commission. That is certainly a matter that is properly for the Commission — and the Commission alone — to decide.¹³

As the Guild's *Petition to Deny* makes clear (despite GAF Broadcasting's feigned lack of understanding), the Guild's assertion that its rights have been violated is part and parcel of its claim that GAF Broadcasting's abuses of the Commission's processes "reflect adversely on its character and fitness to hold the license for WNCN."¹⁴ The Guild thus does *not* ask the Commission to grant the sort of remedies that might be available in a civil action — e.g., damages or an injunction against use of a name which is confusingly similar to that of the Guild — but requests only that the conduct of GAF Broadcasting (and its parent GAF Corporation) be taken into account in determining its fitness to remain a licensee.¹⁵

The specific issue on which the Guild asks the Commission to conduct a hearing is to determine the effect on GAF Broadcasting's character and fitness



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GAF Broadcasting's discussion of the Guild's references to the confidentiality agreement between it and GAF Corporation is highly disingenuous. GAF is quite evidently invoking that agreement to prevent the Guild from bringing crucial facts to the Commission's attention,¹⁶ while simultaneously arguing that the Guild has failed to allege "facts indicating that GAF violated any Commission rule or policy,"¹⁷ and denying that any such facts exist.¹⁸

Lest there be any confusion regarding this matter, it should be clearly recognized that the Guild does not wish to withhold information from the Commission, but has felt constrained to do so because of its concern — now confirmed by the *GAF Opposition* — that GAF would contend that such disclosure,¹⁹ even to the Commission, would violate the parties' confidentiality agreement. In short, it is GAF and not the Guild that is responsible for the Commission having been provided with redacted documents.

It is highly inequitable and improper for GAF to seek to avoid Commission scrutiny of its alleged wrongdoing by invoking a confidentiality agreement which the Guild alleges it was induced to enter into by GAF precisely for the purpose of preventing such Commission scrutiny. The Guild therefore calls upon GAF to submit to the Commission both the confidentiality agreement and unredacted copies of the documents heretofore submitted in redacted form by the Guild. That will enable the Commission to determine on the basis of all of the material facts whether the Guild has made a *prima facie* showing that GAF is guilty of misconduct that affects adversely

16. *GAF Opposition* at 38 n. 17.

17. *Id.* at 38.

18. *Id.* at 38 n. 17.

19. It should be understood that the Guild does not propose to disclose any confidential or proprietary material received from GAF; rather, the Guild would wish only to disclose the circumstances under which such material was provided to it.

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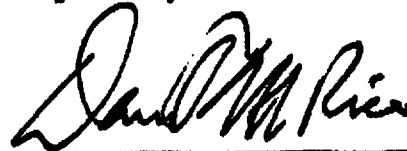
its character and fitness to hold a license. Unless GAF makes such disclosure to the Commission within thirty days from the date hereof, the Guild intends to submit such documents to the Commission, after giving prior notice to GAF of the proposed form and manner of such submission.²⁰

CONCLUSION

As the statutory requirements for designation of a hearing, 47 U.S.C. § 309(e), have been satisfied, the Commission should designate the Licensee's renewal application for hearing on each of the issues pleaded in the Guild's *Petition to Deny*.

Dated: August 21, 1991

Respectfully submitted,



David M. Rice
One Old Country Road
Carle Place, New York 11514
(516) 747-3900

Attorney for Petitioner
LISTENERS' GUILD, INC.

20. The Guild is prepared to negotiate with GAF concerning the form and manner of submission, such as a sealed filing or other appropriate means of protecting any legitimate confidentiality interest.

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File No.
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COUNTY OF QUEENS)

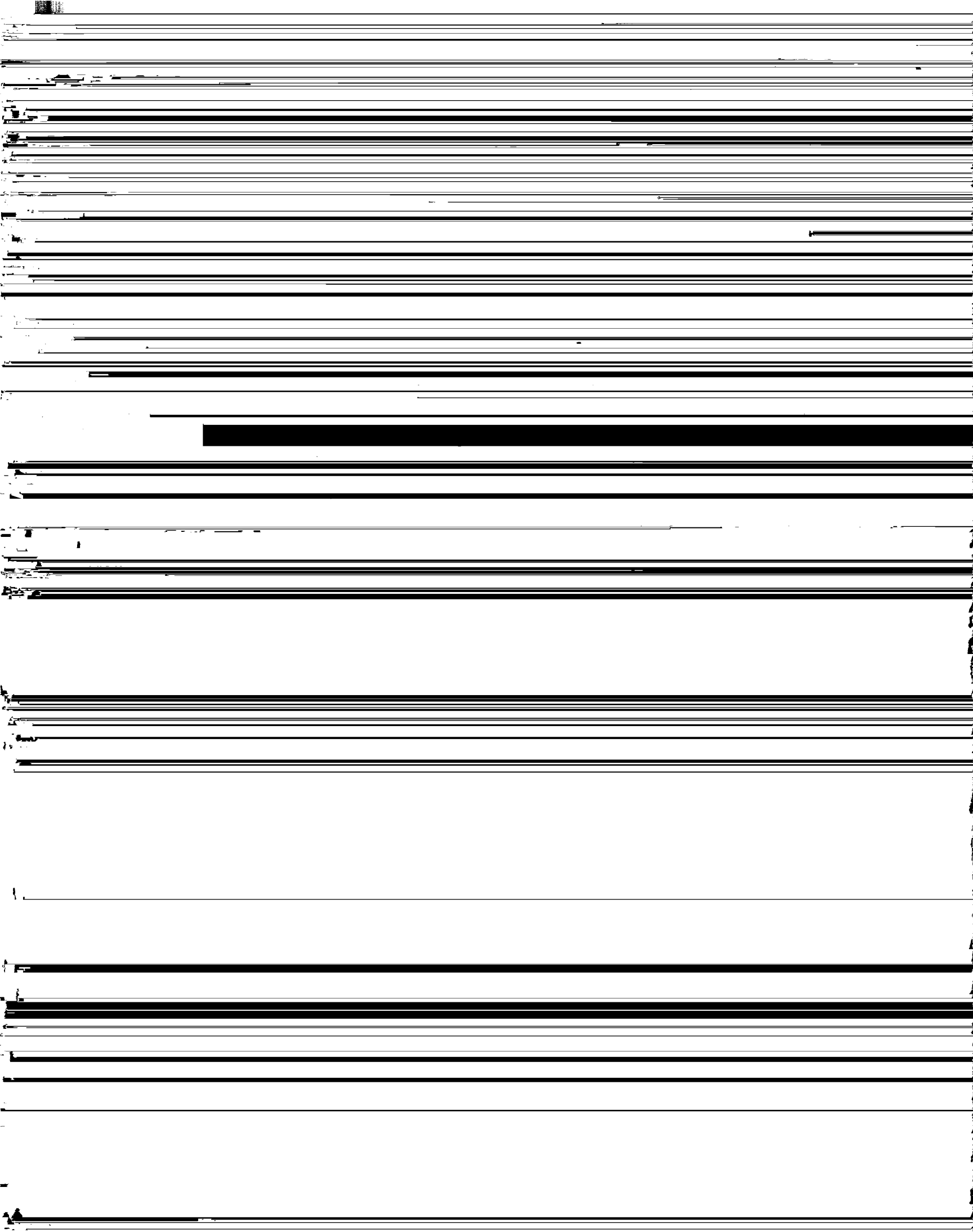
Ss:

DAVID M. RICE, an attorney admitted to the bar of the State of New York,
 hereby affirms, under penalty of perjury, as follows:

I am the attorney for Listeners' Guild, Inc. ("Guild"), the Petitioner herein. Prior to becoming counsel for the Guild several years ago, I represented Classical Radio for Connecticut, Inc. ("CRC"), a sister group which joined the Guild as co-petitioner to deny GAF Broadcasting's 1981 renewal application for WNCN. In that capacity I participated in, and thus am familiar with, all of the ensuing proceedings, which culminated in an appeal to the D.C. Circuit.

In 1981, several former Guild officials resigned and formed Classical Radio, Inc. ("Classical") — a corporation completely unrelated to Classical Radio for Connecticut, Inc. — which filed a competing application for WNCN's license. There was no coordination between the principals and counsel for the petitioners to deny (the Guild and CRC) on the one hand, and the principals and counsel for the competing applicant (Classical) on the other. In fact, the positions taken by the Guild and CRC were adverse to Classical. The Guild and CRC asked the Commission to renew the license for WNCN, subject to a condition that would be of no benefit to Classical.

EXHIBIT A



CERTIFICATE OF SERVICE

I, DAVID M. RICE, hereby certify that the foregoing "REPLY TO OPPOSITION TO PETITION TO DENY" was served this 21st day of August, 1991, by mailing a true copy thereof by United States first class mail, postage prepaid, to: